

Hon. Timothy W. Dore
Ch. 13

Location: Seattle

Date of Hearing: January 17, 2024

Time: 9:30 a.m.

Response Date: January 10, 2024

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

In re:

NICHOLE PORTIA LEIGH,

Debtor.

Case No. 23-10050-TWD

Adversary No. 23-01031-TWD

CIRCLE SYSTEMS, INC., a Washington
corporation,

Plaintiff,

v.

NICHOLE PORTIA LEIGH, an individual, and
NEPTUNE GLOBAL, LLC, a Washington
limited liability company,

Defendants.

**PLAINTIFF'S MOTION TO REVOKE
CONFIRMED CHAPTER 13 PLAN**

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Circle Systems, Inc. requests that the Court revoke Debtor's confirmed Chapter 13 Plan pursuant to 11 U.S.C. 1330(a) because Debtor procured the order confirming the plan by fraud. Circle Systems' motion is timely because it is filed within 180 days of the entry of the order confirming the plan. 11 U.S.C. § 1330(a).

II. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core

1 proceeding under 28 U.S.C. § 157(b)(2) because it is related to a case pending in this Court
2 under Chapter 13 of the Bankruptcy Code, captioned as *In re Nichole Portia Leigh*, Case
3 No. 23 -10050-TWD (hereinafter “*In re Leigh*”).

4 **III. EVIDENCE RELIED UPON**

5 This Motion relies upon the concurrently filed Declaration of Steven Dubnoff (“Dubnoff
6 Decl.”).

7 **IV. STATEMENT OF FACTS**

8 **A. Circle Systems terminated Debtor for misconduct.**

9 Circle Systems is a provider of software solutions. Its main product enables data
10 exchange between statistical packages, databases, and spreadsheets. Debtor was an employee of
11 Circle Systems from August 2012 until she was fired for misconduct in February 2020. In
12 particular, Debtor created a company that competed directly with Circle Systems for the same
13 services and customers. Debtor also misappropriated Circle Systems’ confidential proprietary
14 information and trade secrets. It is suspected that Debtor used the misappropriated confidential
15 proprietary information and trade secrets to obtain a patent for secure data exchange currently
16 held by Debtor’s company, Data Mover LLC (“Data Mover”).

17 **B. Circle Systems sued Debtor in state court for the misconduct.**

18 In May 2020, Circle Systems sued Debtor in King County Superior Court, Case
19 No. 20-2-09099-9-SEA (“State Court Action”), for her employment misconduct. In its
20 Complaint, Circle Systems alleged a breach of fiduciary duty, breach of the duty of loyalty,
21 intentional interference with contractual relationships and business expectancy, misappropriation
22 of trade secrets, and accessing protected computers without authorization. Debtor answered over
23 two years later, alleging counterclaims for infliction of emotional distress, unpaid wages,
24 discrimination, defamation, and tortious interference. During the pendency of the State Court
25 Action, Debtor represented that Data Mover’s patent was worth up to \$10 million. Dubnoff
26 Decl. ¶ 3.

1 Circle Systems moved to dismiss Debtor's counterclaims on summary judgment. A
2 hearing on the motion was scheduled for January 13, 2023.

3 **C. Debtor filed for bankruptcy protection on the eve of summary judgment.**

4 The day before Circle Systems' summary judgment hearing, Debtor filed her voluntary
5 petition for protection under Chapter 13 of the bankruptcy code. *In re Leigh*, Dkt. No. 1. When
6 identifying her assets, she listed her 100% interest in Data Mover. *See id.* at 14. She stated that
7 Data Mover's only asset was the data exchange patent,¹ which was offset by one debt of
8 \$20,000. *Id.* She certified that the company had no value. *Id.* Debtor made the same
9 representations in the amended schedules she filed in June 2023. *In re Leigh*, Dkt. No. 78 at 7.
10 Because Debtor claimed that her interest in Data Mover was zero, she claimed the interest was
11 exempt under a Washington law allowing exemption of personal property interests below
12 \$10,000 in value. *Id.* at 13 (citing RCW 6.15.010(1)(d)(ii)).

13 **D. The confirmed plan pays unsecured creditors less than 50 cents on the dollar.**

14 Circle Systems objected to Debtor's plan, alleging that she failed to demonstrate that it
15 met the best interests of creditors test, that she did not present the plan in good faith, and that the
16 plan was not feasible. *In re Leigh*, Dkt. No. 21 at 3–5. In particular, Circle Systems objected that
17 Debtor appeared to be “misrepresenting property interests, hiding assets, and mischaracterizing
18 pending litigation.” *Id.* at 4. Circle Systems never withdrew this objection. Thereafter, Circle
19 Systems filed an adversary complaint requesting that its claim be deemed non-dischargeable
20 under Bankruptcy Code sections 523(a)(4) and (a)(6), and bringing claims for intentional
21 interference with a business expectancy, misappropriation of trade secrets, computer fraud and
22 abuse act violations, breach of fiduciary duty, and civil conspiracy. Dkt. No. 1.

23 Nevertheless, Debtor managed to obtain approval of her Amended Chapter 13 Plan. *See*
24 *In re Leigh*, Dkt. No. 71. The confirmed plan calculated that the liquidation value of Debtor's
25 estate was \$524,255 and set aside that amount to pay nonpriority unsecured claims. Dkt. No. 68

26 ¹ Patent No. 11,157,644 issued October 26, 2021.

1 at 4–5. This was less than the total amount of such claims, which amount to \$1,075,601.76. *See*
2 *In re Leigh*, Claims Register. Circle Systems’ unsecured claim alone is for \$736,660. *In re Leigh*,
3 Proof of Claim No. 19 at 2. Consequently, under the confirmed plan, Circle Systems received
4 only 49 cents on the dollar for its claim.

5 **E. Debtor re-asserts that her assets are worth millions of dollars.**

6 After confirmation of Debtor’s plan, Debtor has represented that the Data Mover patent is
7 worth at least \$2 million. Dubnoff Decl. ¶ 4.

8 **V. ARGUMENT AND AUTHORITY**

9 As an alternative to liquidation under Chapter 7, individual debtors may utilize
10 Chapter 13 of the Bankruptcy Code to resolve debts through flexible repayment plans approved
11 by the bankruptcy court. *See Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 327 (1993);
12 11 U.S.C. § 1321. However, this flexibility cannot come at the expense of creditors or the
13 objectives of the Bankruptcy Code. *See* 11 U.S.C. § 1325. As such, a debtor’s Chapter 13 plan is
14 not confirmable if she proposes to pay unsecured creditors less than they would have received in
15 a Chapter 7 liquidation, or if she does not bring her plan in good faith. 11 U.S.C. § 1325(a)(3)–
16 (4).

17 Debtor’s plan would not have qualified for confirmation if she had disclosed the true
18 value of her partnership interest in Data Mover. In the plan approved by this Court, Debtor
19 represented that the total value of her nonexempt property could allow for only 49 cents on the
20 dollar payment to Circle Systems and the other unsecured, nonpriority creditors. Had she
21 disclosed that Data Mover was actually worth at least \$2 million dollars, it would have been
22 apparent to the Court that unsecured creditors would have received larger payments under a
23 Chapter 7 liquidation. Debtors’ contradictory, self-serving valuations demonstrate her intent to
24 deceive the Court so that it would confirm a non-compliant plan.

25 Obtaining confirmation of a Chapter 13 plan through fraudulent means compels
26 revocation of the plan and dismissal of the case. 11 U.S.C. § 1330. This Court should dismiss

1 Debtor's case because she fraudulently induced the Court to confirm her Amended Chapter 13
2 Plan.

3 **A. Debtor fraudulently induced the court to approve her plan.**

4 Within 180 days after entry of an order confirming a Chapter 13 plan, a party in interest
5 may request revocation of the order if the debtor obtained it through fraud. 11 U.S.C. § 1330(a).
6 Because the meaning of "fraud" under section 1330(a) is undefined, courts have crafted the
7 requirements for a finding of fraud sufficient to revoke a plan. *See In re Edwards*, 67 B.R. 1008,
8 1009 (Bankr. D. Conn. 1986). Five elements establish fraud under Section 1330:

9 (1) the debtor made a materially false representation regarding her
10 compliance with 11 U.S.C. § 1325;

11 (2) that she either knew was false, did not believe was true, or made
with reckless disregard for the truth;

12 (3) with the intent and purpose of deceiving the court to rely on it;

13 (4) the court relied on such representations; and

14 (5) the court's reliance on the false representations caused entry of the
15 confirmation order.

16 *Id.* at 1010. The movant can satisfy this burden on a preponderance of the evidence. *Tenn-Fla*
17 *Partners v. First Union Nat. Bank of Fla.*, 229 B.R. 720, 729 (W.D. Tenn. 1999), *aff'd sub nom.*
18 *In re Tenn-Fla Partners*, 226 F.3d 746 (6th Cir. 2000). Because direct proof of fraudulent intent
19 is rarely available, a Circle Systems may establish fraud through circumstantial evidence and
20 legitimate inferences. *In re Edwards*, 67 B.R. at 1010.

21 All five elements of fraud are present here.

22 **1. The misrepresentations in Debtor's amended schedules and plan disguise her
noncompliance with 11 U.S.C. § 1325.**

23 Debtor's misrepresentations hid the non-confirmability of her plan. A debtor
24 misrepresents her compliance with 11 U.S.C. § 1325 if she intentionally undervalues an asset in
25 her schedules. *See In re Powers*, 48 B.R. 120, 120 (Bankr. M.D. La. 1985). In a Chapter 13 case,
26 the very purpose of submitting schedules to the court is to inform its decision on whether the

1 debtor's plan complies with Section 1325's confirmation requirements. *See* 8 Collier on
2 Bankruptcy § 1325.05 (16th 2023). In particular, the schedules supply the information necessary
3 to assess whether the debtor's plan meets the best interests of creditors test. *See*
4 11 U.S.C. § 1325(a)(4). Under that test, the value of recovery to unsecured creditors under the
5 plan must not be less than the liquidation value, as of the effective date of the plan, of the
6 nonexempt assets identified in the debtor's schedules. *Id.*; 8 Collier on Bankruptcy § 1325.05.

7 Debtor implicitly represented to the Court that her plan was compliant when she filed it.
8 She repeatedly declared under penalty of perjury that her bankruptcy schedules were true and
9 correct. Dkt. Nos. 1 at 14, 11 at 5, 39 at 7, 78 at 15. Had Debtor represented the true value of
10 Data Mover, that asset would not have been exempt and would have added at least \$2 million to
11 the value that could be distributed to unsecured creditors. In her amended plan, Debtor stated that
12 the liquidation value of her estate (including the patent) was only \$524,255. *In re Leigh*, Dkt.
13 No. 68 at 5. In contrast, she represented before her petition was filed that the patent was worth up
14 to \$10 million, and after confirmation she maintained that it was worth at least \$2 million.
15 Dubnoff Decl. ¶¶ 3–4. Consequently, Debtor's out-of-court valuations suggest that the true
16 liquidation value would have been at least \$2,504,255 and afforded all creditors full repayment.
17 As such, Debtor's zero-dollar valuation in Bankruptcy Court conceals her plan's noncompliance
18 with the best interests of creditors test.

19 Debtor's misrepresentations also disguised her lack of good faith. Good faith is a
20 mandatory prerequisite to confirmation. 11 U.S.C. § 1325(3); *In re Gonzales*, 172 B.R. 320, 325
21 (E.D. Wash. 1994). Misrepresentations of fact in the debtor's petition or plan violate the good
22 faith requirement. *See In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). For example, in *In re Eisen*,
23 the court held that the debtor had filed his petition in bad faith because he had mis-valued his
24 assets and had used the filing as a litigation tactic to stymie a state court action against him. *Id.*
25 at 470–71. This case is just like *Eisen*—Debtor has misrepresented the value of her assets and
26 used her petition to frustrate Circle Systems' state court proceeding against her.

1 **2. Debtor's contradictory, self-serving valuations demonstrate her knowledge**
2 **and intent to deceive this Court.**

3 Debtor's actions demonstrate both that she knew her statements were false and that she
4 intended the Court to rely on them. A debtor's intentional misrepresentation of assets and
5 liabilities in her schedules amounts to fraud in connection with the case. *See In re Kingsley*,
6 162 B.R. 249, 254 (Bankr. W.D. Mo. 1994). A debtor knowingly submits false statements, or
7 recklessly disregards the truth, when they submit schedules representing the value of an asset as
8 zero despite having knowledge that the asset actually has value. *See In re Powers*, 48 B.R.
9 at 120. For example, in *In re Powers*, the court revoked the debtor's Chapter 13 plan because the
10 debtor's schedules undervalued his tax return by \$8,000 and listed valuable assets as valueless.
11 *Id.* Significantly deflating the valuation of an asset while concealing higher, contradictory
12 valuations permits a cogent and compelling inference of fraudulent intent. *See New Enterprises*
13 *Ltd. v. SenesTech Inc.*, No. CV-18-08033-PCT-JAT, 2019 WL 3858506, at *8 (D. Ariz. Aug. 16,
14 2019) (unpublished).

15 Here, Debtor's valuation of the Data Mover patent in her bankruptcy schedules is
16 millions of dollars lower than the value she assigns it outside the bankruptcy proceeding. Despite
17 assigning no value to Data Mover in the amended schedules filed in June 2023, only months later
18 she believed that the company's principal asset was worth \$2 million. *Compare In re Leigh*, Dkt.
19 No. 78 at 7 with Dubnoff Decl. ¶ 4. Moreover, her pre-bankruptcy valuation of \$10 million
20 forecloses any inference that Debtor honestly believed that the patent was worth less than
21 millions of dollars. *See Dubnoff Decl.* ¶ 3. At best, Debtor recklessly disregarded the truth when
22 she attested to the patent's (and therefore Data Mover's) value. Had Debtor revealed that Data
23 Mover was actually worth millions of dollars, she could not have exempted the asset or shielded
24 it from liquidation. This contradictory, self-serving behavior demonstrates that she intentionally
25 withheld the true value of the patent for the purpose of obtaining confirmation.

26 Moreover, even when a debtor has previously asserted out of court that an asset has high

1 value, creditors are entitled to rely on the debtor's sworn statements about that asset having a
2 lower value so long as the debtor's sworn statements are consistent. *See in re Valenti*, 310 B.R.
3 138, 151 (B.A.P. 9th Cir. 2004). Creditors are not required to "'ferret out' inaccuracies in a
4 debtor's sworn bankruptcy schedules." *Id.* (quoting *In re Duplante*, 215 B.R. 444, 447 n.8
5 (9th Cir. B.A.P. 1997)). As such, an objecting creditor's ability to request discovery regarding the
6 amounts represented does not obviate the debtor's duty to disclose "adequate information." *In re*
7 *Michelson*, 141 B.R. 715, 719 (Bankr. E.D. Cal. 1992).

8 Here, Circle Systems had a right to rely on Debtor's sworn statement that the value of
9 Data Mover was zero, because Debtor swore it was true. Up until that point, any assertions as to
10 the value of the patent could have been viewed as posturing. However, because Debtor has now
11 renewed her multi-million dollar valuation of the patent after submitting a contradictory, sworn
12 statement, Circle Systems must now raise the issue for the benefit of the Court and other
13 creditors.

14 **3. The Court relied on Debtor's valuation of the patent when it entered the order**
15 **confirming the plan.**

16 The Court's confirmation of the plan necessarily relied upon Debtor's false statements. A
17 finding that the debtor has complied with both the good faith requirement and best interests of
18 creditors test is mandatory upon confirming a plan. *In re Blendheim*, 803 F.3d 477, 485–86 (9th
19 Cir. 2015). As demonstrated above, Debtor's plan met neither requirement. Nonetheless, the
20 Order Confirming Chapter 13 Plan held that the plan "satisfies the requirements of 11 U.S.C.
21 section 1325." *In re Leigh*, Dkt. 71. "The suppression of material facts that likely would have led
22 to a different result unambiguously constitutes an impairment of the adjudicatory process." *In re*
23 *Michelson*, 141 B.R. at 730. When the court confirms a plan that would not have complied with
24 the requirements of Section 1325 had the debtor's representations been accurate, it compels the
25 conclusion that the court relied on the false statements in confirming the plan. *In re Nikoloutsos*,
26 199 F.3d 233, 238 (5th Cir. 2000). In sum, Debtor's misrepresentations directly resulted in

wrongful confirmation of the plan.

B. Debtor's Chapter 13 case should be dismissed.

Upon revocation of a confirmation order, "the court shall dispose of the case" pursuant to and in accordance with 11 U.S.C. § 1307. 11 U.S.C. § 1330(b). Disposal of the case is required unless the court permits and approves a modified plan. *Id.*; *see also* 11 U.S.C. § 1329. A modified plan would be fruitless in this case, because no amendment could remedy Debtor's noncompliance with Chapter 13's confirmation requirements.

VI. CONCLUSION

Debtor's fraud in obtaining the order confirming her Amended Chapter 13 Plan necessitates its revocation. This Court should revoke the plan and dismiss Debtor's Chapter 13 case.

Dated: December 11, 2023

SNELL & WILMER L.L.P.

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